No. 02-241

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In the Supreme Court of the United States

BARBARA GRUTTER,

Petitioner

VS.

LEE BOLLINGER, ET AL.,

Respondents

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF OF THE SOCIETY OF AMERICAN LAW TEACHERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

The Society of American Law Teachers (SALT) was founded in 1973 by a group of leading law professors dedicated to improving the quality of legal education by making it more responsive to social concerns. SALT is now the largest membership organization of professors in the United States, with over 800 members at more than 150 schools. SALT is committed to promoting public service in the legal profession, promoting social justice and advancing human rights. SALT filed a brief *amicus curiae* supporting the Regents in the *Bakke* case in 1978, and has continued to support programs and policies aimed at fairness and inclusion in admissions to law school, the legal professorate and the legal profession as a whole.

SUMMARY OF ARGUMENT

Affirmative action is an effective policy for an imperfect world. As a nation, we long for the day when affirmative action will no longer be necessary, but we are not there yet.

Discrimination continues to drastically affect the lives of African-American, Latino and Native-American students in ways that suppress their grades and standardized test scores. The state of Michigan and its localities have a long history of discrimination, and while many of the overt acts of discrimination have receded, substantial discriminatory practices and effects remain. The Detroit metropolitan area is the most segregated large metropolis in the country, and the

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[1] This brief is filed with the consent of the parties. Blanket consents to the filing of briefs *amicus curiae* were filed with the Court by the parties on December 20, 23, and 30, 2002. No counsel for a party authored this brief in whole or part, and no person or entity other than SALT made a monetary contribution to the preparation or submission of this brief.

pattern of segregation is the product of deliberate governmental acts intended to limit the residential choices of African Americans. Segregated housing patterns have led, in turn, to severe segregation in the schools. There have also been a number of egregious cases of intentional discrimination in schools that have likewise affected minority students throughout the state. Further incidents of discriminatory conduct are detailed below, all of which together demonstrate a clear basis in fact for the state's remedial action. It is important to emphasize that the discriminatory acts discussed below are not the product of a bygone era, nor are they what this Court has defined as societal discrimination, but instead are identified acts of discrimination that continue to affect the lives of the students now applying to law school.

The Law School's affirmative action policy is necessitated to remedy discriminatory conditions, but also to ameliorate the adverse impact of the Law School Admission Test ("LSAT"). As has been well documented, the LSAT has a significant adverse impact on African-American, Latino and Native-American students, and if the law school were not allowed to take race into account as one factor in the admission process, the school would likely revert to the days when its student body included no, or a mere handful of, minority students.

ARGUMENT

I. PAST AND PRESENT DISCRIMINATION JUSTIFIES THE LAW SCHOOL'S AFFIRMATIVE ACTION PLAN.

Although the Law School has sought to justify its affirmative action policy based on the pedagogical value of having a diverse student body – a justification we support and one that alone provides a basis for upholding the policy – the Intervenors were allowed to participate in this case for the express purpose of establishing that the policy is also justified as a remedy for past and present discrimination. See *Grutter* v. *Bollinger*, 188 F.3d 394, 401 (6 th Cir. 1999). As detailed below, the necessity of remedying past and present discrimination provides a compelling interest sufficient to justify the inclusion of race as a factor in the admission process.

A. Discrimination Perpetrated by the State and Its Localities.

1. Residential Segregation. Based on the 2000 Census, African Americans comprise 14.2% of Michigan's population, with Hispanics representing 3.3% and Native Americans 0.6% of the population. See U.S. Census Bureau, Statistical Abstract of the United States 25-26 (121st ed. 2001). The vast majority of Michigan's African Americans reside in Detroit, which over the last few decades has evolved from a city in which African Americans constituted approximately 40% of the population to one in which African Americans now constitute nearly 80% of the city's population. Based on a common measure of segregation, which identifies the percentage of African Americans who would have to move in order for the city to be considered integrated, Detroit is now the most segregated large metropolitan area in the United States, and has been for many years. See R. Farley et al., Stereotypes and Segregation: Neighborhoods in the Detroit Area, 100 American J. of Sociology 750, 751 (1994) (identifying Detroit as the most

segregated metropolitan area of more than a million residents and the only area in which segregation increased during the 1980s).[2]

The metropolitan area has taken on a distinctive form of segregation, with African Americans concentrated in the city of Detroit while whites generally reside in the suburbs that ring the city. As of 1990, 76% of the population of the city of Detroit was African American, whereas the suburbs surrounding the city were 95% white. See R. Farley, S. Danziger & H.J. Holzer, Detroit Divided 4 (2000). Of the twenty-seven suburban metropolitan cities with more than 35,000 inhabitants, in only four were African Americans more than 5% of the population, and three of those cities (Inkster, Highland Park, Southfield) accounted for more than two-thirds of the suburban black population. *Id.* at 160 Table 6.1. These figures have changed only modestly since 1970.

This pattern of segregation did not emerge as a result of either choice or chance, but instead is the product of a multitude of deliberate actions, many of which have been perpetrated by the state or its localities. Several of the major suburban cities, Dearborn and Warren in particular, have had long histories of open hostility toward integrated housing. See G. Trowbridge and O. Brand-Williams, The Past: Policy of Exclusion, Detroit News, Jan. 14, 2002, at B1 (discussing discriminatory housing policies of Dearborn and Warren).[3] Efforts to wall out African American residents from the

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[2] The measure, generally referred to as an index of dissimilarity, for Detroit was 89. Farley et al., *supra*, at 751. An index of 89 means that 89% of African Americans would have to move in order to achieve integrated housing that mirrors the diversity of the population.

[3] The City of Dearborn gained notoriety for its Mayor, who was an avowed segregationist. First elected in 1942, he served for thirty-five years. See Farley, Danziger & Holzer, *supra*, at 156-57.

suburbs did not cease in the 1950s. In the early 1970s, Warren was labeled by Time magazine as the "most racist city" in America after it turned down federal funds designated for low-income housing. See T. Jacoby, Someone Elses' House: America's Unfinished Struggle for Integration 262 (1998). In 1988, the City of Dearborn's effort to exclude non-residents from its City parks was struck down by a state court because of its discriminatory impact on African Americans. See *Detroit Branch, NAACP* v. *City of Dearborn*, 173 Mich. App. 602, 615-16, 434 N.W. 2d 444, 450 (1988).[4] In the mid-1980s, the City of Birmingham was found liable for violating the Fair Housing Act for opposing racially integrated housing. See *United States* v. *City of Birmingham*, 727 F.2d 560 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984). Several years earlier, the City of Livonia was denied federal housing funds because of its discriminatory policies. See J.T. Darden, et al., Detroit: Race and Uneven Development 144 (1987). The Justice Department continues to file more lawsuits for housing violations in the Detroit metropolitan area than any other location in the United States. See K. Bradsher, Nouvelle Detroit? Global Growth Brings Changes at Home, New York Times, Oct. 16, 1997, at G1.

Although some of the discriminatory policies that helped create racial segregation in the metropolitan area date to the 1950s, many of the policies were in place well into the 1980s and 1990s, when the students who are now applying to law school were growing up.[5] A survey taken in the 1990s

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[4] Years later the Michigan Court of Appeals altered the standard for proving intentional discrimination that had been applied in *NAACP* v. *City of Dearborn*. See *Harville* v. *State Plumbing Heating, Inc*, 218 Mich. App. 302, 319, 553 N.W.2d 377, 386 (1996).

[5] Even the policies from the 1950s or earlier can still effect residential patterns today. For example, the city of Inkster was developed in the 1930s by Henry Ford to house his African-American

found that black and white respondents still strongly identified Dearborn and Warren as hostile places for African Americans to live. See Farley, Danziger and Holzer, *supra*, at 195 (noting that a substantial number of respondents in 1992 singled out Dearborn and Warren as hostile to African Americans). Similarly, only long after a federal court found the City of Hamtramck liable for racial discrimination in its demolition of a predominantly black neighborhood in 1971, did the City agree to remedy its discrimination by providing the plaintiffs discounts on newly constructed housing. See C.M. Singer, New Homes Lure Back Blacks Kicked Out in '60s, Detroit News, Dec. 11, 2002, at A1.

Unfortunately, the state was not the only responsible party for this invidious discrimination. In the 1950s, at the time the suburbs were being developed, Federal Home Loan Bank officials collaborated with local real estate brokers and lenders to deny loans designated for neighborhoods that had even small populations of African Americans, as well as loans for black home builders. See T.J. Sugrue, The Origins of the Urban Crisis: Race and Inequality in Postwar Detroit 43-46 (1996). The realtors code of ethics for Detroit at the time prohibited introducing "members of any race or nationality . . . whose presence will be clearly detrimental to real estate values." *Id.* at 46.

This brief history demonstrates a clear pattern of racial discrimination that has played a central role in creating the segregated housing pattern of the Detroit metropolitan area. It also refutes the notion that the housing patterns are the product of voluntary preferences of African Americans. Indeed, surveys continually demonstrate that African Americans at all income levels prefer to live in integrated

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employees, and in 1990, this city remained one of the very few suburbs that had a substantial black population. See Farley, Danziger and Holzer, *supra*, at 155.

neighborhoods where approximately half of the residents are African American. See R. Farley, C. Steeh, et al., Continued Racial Residential Segregation in Detroit: "Chocolate City, Vanilla Suburbs" Revisited, 4 J. of Housing Research 1, 27 (1993). By the same measure, although white attitudes have clearly evolved over the past two decades, a 1992 survey of white Detroit residents indicated that 59% would be unwilling to move into a neighborhood that was one-third black, while 29% would seek to move from such a neighborhood. See *id.* at 26, Figure 2.[6] Studies also indicate that Detroit residents are far more apt to move out of an integrating neighborhood than are white residents of other large urban cities. See M. Krysan, Whites Who Say They'd Flee: Who Are They, and Why Would they Leave? 39 Demography 675 (Nov. 1, 2002) (finding that whites in Detroit were four times as likely as whites in Boston and significantly more likely than whites in Atlanta to seek to move when a neighborhood became 20% black).

It is also clear that the entrenched patterns of segregation cannot be explained by differences in income levels. Within the Detroit metropolitan area, blacks and whites live apart at all income levels. See B. Heath, O. Brand-Williams, & S. D. Lewis, Wealth Doesn't Stop Racial Divide, Detroit News, Nov. 3, 2002, at 1A (noting that Detroit was one of the few areas in the nation where "blacks and whites live apart at virtually every income level").[7] The Detroit News

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[6] These figures showed significant improvements over those from a similar 1976 study conducted by the same authors. In the 1976 study, 41% of whites said they would seek to move from a neighborhood if more than a third of the residents were black, while 73% indicated they would not move into a neighborhood with a similar racial composition. See Farley, Steeth, et al., *supra*, at 27.

[7] An earlier study conducted by researchers at the University of Michigan came to the same conclusion. See R. Farley, C. Steeh, et al., *supra*, at 5 ("Prosperous blacks were just as segregated from prosperous whites as impoverished blacks were from impoverished whites.").

study also found that 25% of African Americans but only 7% of whites who earned more than $200,000 annually were denied mortgages. *Id.* Unlike other metropolitan areas that have seen a rapid migration of African Americans from the city to the suburbs, the Detroit area is noteworthy for continuing to segregate even prosperous African Americans, a majority of whom still live in the central city. See Farley et al, *supra*, at 171 ("More than 90% of whites with incomes exceeding $100,000 or with post-graduate degrees resided in the suburbs. For similarly advantaged blacks, less than 50% lived in the [suburban] ring.").

The pattern of severe residential segregation in metropolitan Detroit has had a direct and substantial effect on the lives and opportunities of African Americans. One direct consequence has been a spatial disconnect between the residential location of African Americans and available jobs, because job growth has been far stronger in the suburbs during the last two decades than it has been in the central city. See Farley et al., *supra*, at 111-28. Most Detroit area residents work near where they live; eighty-eight percent of employed white suburban residents work in the suburbs, while 59% of employed African Americans who live in Detroit also work in the city. *Id.* at 127, Table 5.1. When companies relocate from Detroit to the suburbs, African-American employees are often left behind. See J. Zax and J.F. Kain, Moving to the Suburbs: Do Relocating Companies Leave Their Black Employees Behind? 14 J. of Labor Econ. 472 (1996) (finding that 11.3% of black employees quit after company relocated to Dearborn). As a result, African Americans and Latinos in Michigan have unemployment rates that are more than double those for white Michigan residents. See Bureau of Labor Statistics, Employment Status of The Civilian Noninstitutional Population by Sex, Age, Race, and Hispanic Origin: 2001 Annual Averages 28 (2002).

The harms from segregation extend well beyond job loss, or increased commuting time resulting in less family

time. Glenn Loury has long stressed the importance of social capital – the contacts one makes from life's interactions – and segregated neighborhoods can substantially limit one's access to valuable social capital. See G.C. Loury, The Anatomy of Racial Inequality 76-78 (2001) (discussing the harms that arise from social isolation and negative perceptions); see also G.J. Chin, S. Cho, J. Kang & F. Wu, Beyond Self Interest: Asian Pacific Americans Toward a Community of Justice, A Policy Analysis of Affirmative Action, 4 UCLA Asian Pac. Am. L.J. 129, 131-32 (1996) (suggesting that harms caused by discrimination may affect subsequent generations). Two economists recently set out to measure the effects of residential segregation in a number of communities, including Detroit. The authors concluded:

> Using a variety of economic and social outcomes, we find strong, consistent evidence that black outcomes are substantially worse (both in absolute terms and relative to whites) in racially segregated cities than they are in more integrated cities. As segregation increases, blacks have lower high school graduation rates, are more likely to be idle (neither in school nor working), earn less income, and are more likely to become single mothers.

D. M. Cutler & E. L. Glaeser, Are Ghettos Good or Bad? 112 Q. J. of Econ.827, 828 (1997). Clearly, the pattern of residential segregation in metropolitan Detroit, created with the active participation of the state, has substantially limited the life opportunities of many African Americans, and likely in many ways that have yet to be documented because they are simply too difficult to measure.

2. Discrimination in Education. The residential segregation of Michigan's citizens also has had a profound effect on the state's educational system. Indeed, very few of

Michigan's residents have ever attended what can be described as an integrated school.[8] Moreover, the segregation in the schools has erected substantial barriers to performance for many minority children.

The Detroit School District is the largest school district in Michigan, and it educates a majority of the state's minority school children. This Court addressed the segregation in the schools in metropolitan Detroit in two cases in the 1970s. In *Milliken* v. *Bradley*, 418 U.S. 717 (1974), this Court vacated a lower court's remedial order that required interdistrict busing as a means of remedying established unlawful discrimination within the Detroit school system. This Court held that an interdistrict remedy was impermissible without a finding that the segregation within the Detroit schools was attributable to interdistrict discrimination. *Id.* at 745. Several years later this Court upheld the lower court's order requiring compensatory education as a remedy for the intentional segregation of the Detroit schools and required funding from the state for its part in creating a dual school system. *Milliken* v. *Bradley*, 422 U.S. 267 (1977). In so holding, this Court specifically noted that the Detroit schools had been "pervasively and persistently segregated." *Id.* at 282.

The District Court retained jurisdiction in the *Milliken* case until 1989, but during that time there was little progress either in integrating schools or in student performance. The Detroit public schools have been defined as either the most segregated public school district in the country, or the third most segregated district depending on the measure that is used. See C. Lee & G. Orfield, A Multiracial Society with Segregated Schools: Are We Losing the Dream? 50 (2003). The

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[8] In describing the testimony of expert witness Gary Orfield, the District Court stated, "Of all the states, Michigan has the highest percentage (64%) of black students who attend schools whose student populations are 90-100% minority." *Grutter* v. *Bollinger*, 137 F. Supp. 2d 821, 857 (E.D. Mich. 2001).

performance of the students also falls well behind their suburban peers. For the 2000-01 school year, the Detroit School District had a graduation rate of 54.2%, while the median graduation rate for Michigan schools was 89.3%. See Center for Educational Performance and Information, 2000-01 Michigan Graduation/Dropout Rates at 16 (Nov. 2002). For the 1998-99 school year, the Detroit School District fell below the state average on each of the twelve performance levels measured by the state. See Michigan Dept. of Education, 1999 Michigan School Report 395-462 (2000). In contrast, the Warren school district, a middle-class suburb just north of Detroit, exceeded the state averages on ten of the measures, while the districts in wealthy and predominantly white suburbs of Troy and Gross Pointe exceeded the state averages on all measures. *Id.* at 212-35. In 1998, the state legislature instituted a takeover of certain aspects of the Detroit school system because of its demonstrated deficiencies. See *Moore* v. *School Reform Bd.*, 293 F.3d 352 (6th Cir. 2002) (upholding takeover).

Although the Detroit school system has received the most attention, many other Michigan jurisdictions were also adjudged to have maintained dual school systems and frequently resisted efforts to dismantle those systems. When a District Court ordered busing as a remedy for segregated schools in Pontiac, ten school buses were blown up. See Darden et al., *supra*, at 231. The decree governing desegregation in the Pontiac school system was dissolved just over two years ago. See *Davis* v. *School Dist. of the City of Pontiac*, 95 F. Supp. 2d 688 (E.D. Mich. 2000). The City of Kalamazoo, one of the largest cities in Michigan, was determined to have maintained segregated schools through attendance, staffing and school location decisions. See *Oliver* v. *Kalamazoo Bd. of Educ.*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). Although desegregation orders were instituted in the 1970s, in 1980 the Court of Appeals found that certain compensatory orders were still necessary to address the vestiges of past discrimination. See *Oliver v. Kalamazoo Bd. of Educ.*, 640 F.2d 782 (6th Cir. 1980).

The United States also instituted several actions to withdraw federal funding from Michigan cities because of their segregated school systems. The federal government originally sought to cut-off federal funds from the City of Ferndale in 1969, and several years later instituted a lawsuit seeking to desegregate the city's school system. See *United States* v. *School District City of Ferndale*, 577 F.2d 1339 (6th Cir. 1978). It is notable that Ferndale implemented a "freedom of choice" plan six years after this Court had invalidated such plans in *Green* v. *County School Bd.*, 391 U.S. 430 (1968). See *id.* at 1342. The Court of Appeals subsequently determined that the City's "segregative purpose" continued through much of the 1970s. See *United States* v. *City of Ferndale*, 616 F.2d 895, 899-90 (6th Cir. 1980). The United States also sought to withdraw funding because of segregated schools in the City of Saginaw. See *School Dist. City of Saginaw* v. *United States Dept. of Health, Educ. & Welfare*, 431 F. Supp. 147 (E.D. Mich. 1977) (denying preliminary injunction seeking to stop HEW's enforcement action). These suits were highly exceptional for only in the rarest of circumstances has the federal government sought to withdraw funding from school districts as a result of segregation in the schools. See S. C. Halpern, On the Limits of the Law: The Ironic Legacy of Title VI of the 1964 Civil Rights Act 294-95 (1995)(noting that only during the Johnson administration was "fund termination used with any regularity").

In addition to these lawsuits, the state capitol of Lansing, was held liable for "purposeful segregation in its elementary schools," *NAACP* v. *Lansing Bd. of Educ.*, 559 F.2d 1042 (6th Cir. 1977), *cert. denied*, 434 U.S. 997 (1977), and there has been a long-standing desegregation action involving the town of Benton Harbor. In the 1970s, the District Court found that the school district in Benton Harbor had been set up so as to create black and white schools within the district, see *Berry* v. *School Dist. of the City of Benton Harbor*, 467 F. Supp. 630 (W.D. Mich. 1978), and that the state had specifically "condoned [the] segregative conduct". *Berry* v. *School Dist.*

of the City of Benton Harbor , 515 F. Supp. 344, 349 (W.D. Mich. 1981), *aff'd*, 698 F.2d 813 (6th Cir. 1983). Despite court orders for injunctive relief that began in the early 1970s, the consent decree was not lifted until 2002, and by that time the school district was 95% black. See *Berry* v. *School Dist. City of Benton Harbor*, 195 F. Supp.2d 971 (W.D. Mich. 2002), *modified*, 206 F.Supp. 2d 899 (W.D. Mich. 2002).

As in Detroit, the lengthy efforts to desegregate the schools in Lansing failed to offer substantial improvements. African Americans andLatinos constitute 37% and 14% of the student population respectively, and the district's graduation rate was a mere 57.0%. See Center for Educational Performance, *supra*, at 32. The Benton Harbor School District had a graduation rate of 56.1% *(id.* at 6), and, as in Detroit, the students fell below the state averages, and often far below, on every performance measurement. See Michigan Dept. of Education, 1999 Michigan School Report, *supra*, at 17.

It is often difficult to know whether these demonstrated inequities are the product of discrimination, or are related to other factors that may not necessarily be tied to discriminatory acts. See *Freeman* v. *Pitts*, 503 U.S. 467, 491 (1992) (discussing the need to establish that the racial disparities are traceable in a "proximate" way to discrimination). Yet, in the affirmative action context, this Court has never required specific findings of discrimination, but instead requires "a strong basis in evidence" that remedial action was warranted. See *Miller* v. *Johnson*, 515 U.S. 900, 922 (1995). Quite clearly, segregated schools have existed across the state of Michigan, and have persisted throughout most of the educational experience of the students now applying to law school. The state, along with its municipalities, has played a substantial role in creating these dual school systems, and its efforts now to integrate its system of higher education through modest affirmative action measures are, at a minimum,

necessitated by their prior intentional discriminatory behavior.[9]

Indeed, affirmative action at the higher education level is necessary to provide a full remedy for discrimination in the lower grade levels. One difficulty with applying remedial provisions to education is that the students who have been discriminated against often do not benefit from the subsequent remedial efforts because they have generally graduated to other schools by the time the remedies are implemented. This remedial lag time requires affirmative measures to be applied at levels of higher education, even if those institutions were not the sole perpetrators of the discriminatory behavior.

3. Employment Discrimination. In addition to housing and education, employment discrimination has also had a direct and substantial effect on the lives of African Americans in Michigan.

Most significant in this regard is the pattern of employment discrimination that has existed in the Detroit suburbs. In the mid-1980s, the United States Department of Justice filed employment discrimination suits against eighteen Detroit suburbs for policies that required municipal employees to be city residents. See W. Gerdes, Suit Charges Roseville With Biased City Hiring, Detroit Free Press, July 1, 1987, at 4A (noting that Roseville "became the 18th Detroit suburb sued by the department since last year"). Given that virtually no

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[9] Unlike other urban school districts, such as Boston, Milwaukee and St. Louis, the state of Michigan never implemented any voluntary interdistrict remedies, which meant that many of its efforts, particularly those designed for the Detroit schools, were not aimed at desegregating the schools but were instead aimed solely at providing compensatory remedies. See J. Ryan and M. Heise,The Political Economy of School Choice, 111 Yale L.J. 2043,2070-71 (2002) (describing programs in other jurisdictions that implemented voluntary interdistrict remedies).

African Americans lived in these suburbs, the policies had a predictable discriminatory effect on African Americans. Although the Justice Department instituted similar suits in other parts of the country, the official heading the investigations noted that the policies were more pervasive in the Detroit region than in any other area of the country. See W. Gerdes, Feds Say Suburbs' Pattern of Bias Brought on Probe, Detroit Free Press, Feb. 12, 1987, at 1A. Ultimately, all but one of the suburbs settled the litigation; only the City of Warren elected to litigate the case to trial where the United States prevailed in establishing the city's policy as discriminatory. See *United States* v. *City of Warren*, 138 F.3d 1083, 1091 (6th Cir. 1998).

Racial discrimination also remains a significant force in the private sector. A recent study of the hiring practices in firms located in the city of Detroit and in the suburbs found that "racial discrimination persists" in the form of "discriminatory hiring practices of largely white suburban firms, the harassment of black workers in the suburbs," and in wage discrepencies between firms that have predominantly white workforces and those with substantial numbers of African-American employees. See S.T. Meiklejohn, Wages, Race, Skills and Space: Lessons from Employers in Detroit's Auto Industry 145-47 (2000).

4. Summary. The state of Michigan has had a long and pervasive history of discrimination, a history that is not part of the distant past but that has continued throughout the lives of the students now applying to college and law school. In this history, we have concentrated on discrimination directly tied to state action, which necessarily excludes much of the discrimination that African Americans experience from private employers or other state actors that opted to settle lawsuits or claims out of the public eye. Despite court orders and other voluntary efforts, much of the discrimination and its cumulative effects continue to this day and are reflected, in particular, in the academic performance of minority school

children. As discussed further below, this history of identified discrimination provides a compelling reason why the state must be permitted to take race into account in its admissions decisions.

B. The Law School's Reliance on the LSAT has a Disparate Impact On Minority Students.

In addition to the direct discrimination detailed above, the law school's use of the Law School Admission Test (LSAT) as a component of its admission process has a substantial disparate effect on African-American, Latino and Native-American applicants. In its admission decisions, the University of Michigan Law School ("Law School") takes into account both undergraduate grades (UGPA) and LSAT scores. Although these indicators are not the only factors considered, they largely determine which of three groups an applicant will be sorted into: presumptive admits, discretionary admits, or presumptive rejections. At issue in this case are applicants who tend to fall in the discretionary admit category, and, indeed, the Petitioners' primary complaint is that they are not placed in the discretionary admit group, which would entitle them to a comprehensive review of their application, while African Americans of similar qualifications are afforded a comprehensive review.

The adverse impact of the LSAT has been well-documented, and was not contested by any of the parties in the proceedings below. Averaged over a six-year period, the District Court found that there was a test score gap in comparison to white students of 9.6 points for African Americans, 7 points for Latinos, and 6.8 points for Native Americans. See *Grutter* v. *Bollinger*, 137 F. Supp. 2d 821, 864 n.56 (E.D. Mich. 2001).

Removing racial and ethnic considerations from the admission process would have a devastating impact on the number of African American and Latino students who would

be admitted to law schools. See L.F. Wightman, The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions, 72 N.Y.U. L. Rev. 1, 15-17 (1997)(discussing the effect eliminating affirmative action would have on law school admissions). The magnitude of the adverse impact is best exemplified by the experience of the law students at the University of California at Berkeley and the University of Texas after those schools were prohibited from using race in their admission processes. Following the abolition of affirmative action, the number of African American and Latino students at both schools plummeted to levels that had existed in the 1950s and 60s. In analyzing the data, William Kidder writes:

> Boalt Hall's first post-affirmative action class (1997) turned back the clock 30 years. 1967 was the last time there were so few African American and Chicano/Latino first-year students at Boalt . . . . [The Texas student body] . . .included only 19 African Americans out of 1,387 J.D. students (1.4%) . . . a smaller percentage than the fall of 1950, when Heman Sweatt and five other trailblazing African Americans were first permitted to enroll.

See W.C. Kidder, Affirmative Action in Higher Education: Recent Developments in Litigation, Admissions and Diversity Research, 12 La Raza L.J. 173, 210, 214-15 (2001) (footnotes omitted).

In addition to its negative impact on African-American, Latino and Native-American applicants, the LSAT has a limited utility and predictive capacity. The LSAT is intended to predict first-year grades, and does so in a rather rudimentary fashion. See Wightman, *supra*, at 29. At the Law School, the combination of undergraduate grade point average and LSAT scores predicted just 27% of the variance in

first-year grades, leaving nearly three-quarters of the variance unexplained. *Grutter* v. *Bollinger*, 137 F. Supp. 2d at 871.

Not only is this a very weak correlation, but the measure – first-year grades – is of little practical importance. The purpose of law schools is not to produce students with good first-year grades but to produce lawyers who will make substantial contributions to society. On this measure, affirmative action has been a tremendous success. Every study has indicated that minority students, regardless of their particular test scores, have extremely high graduation rates and go on to successful legal careers. See R.O. Lempert, D. L. Chambers & T. K. Adams, Michigan's Minority Graduates in Practice: The River Runs Through Law School, 25 Law & Social Inquiry 395, 422, 471 (2000) (noting that 96% of minority students graduated from Michigan, 96.3% of the graduates passed a bar examination and there was no correlation between "post-law school achievements" and initial index scores); L. F. Wightman, *supra*, at 38 (noting that the bar passage rates for students who would not have been admitted based on numeric indicators "range[d] from 72.5 to 93.3%"); D. B. Wilkins et al., Harvard Law School Report on the State of Black Alumni 1869-2000, 45-47 (2002) (finding African-American alumni had "successful and satisf[ing] careers").[10] The Lempert study also demonstrated that minority students were more likely to serve low- and middle-income clients, and were also more likely to be involved in community affairs as

[10] Studies have also demonstrated that the beneficiaries of affirmative action programs in employment and at the undergraduate level have attained high levels of success. See W.G. Bowen & D. Bok, The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions 135-62 (1998) (documenting success of African Americans after college); H. Holzer & D. Neumark, Are Affirmative Action Hires Less Qualified? Evidence from Employer-Employee Data on New Hires, 17 J. of Labor Econ. 534, 566-67 (1999) (finding that women and minorities hired under affirmative action programs performed well on the job).

measured by their representation on non-profit boards. See Lempert, *supra*, at 436 (minority alumni were more likely than white graduates to serve low and middle income clients) and 455 (60% of minority alumni from the 1970s and 48% from the 1980s sat on non-profit boards, significantly higher figures than for white graduates). The Harvard study found that African-American alumni performed more than three times the national average of pro bono work. Wilkins, *supra*, at 47.

Arguably, the Law School should place less weight on GPAs and LSAT scores when considering the files of all applicants. The Law School, however, has made the reasonable judgment that test scores of African- American, Latino, and Native-American students have a different meaning from the test scores of white students. Given the state's history of discrimination, it has a solid evidentiary basis to conclude that discrimination has suppressed the test scores of minority students whereas there is no basis for a similar conclusion with respect to white applicants. To be sure, this judgment is true only in the aggregate – on average – but the admission process works by looking to averages. Just as a student who has a 3.4 grade point average from Harvard will be treated differently from a student with a 3.4 grade point average from a lesser known school, the test scores of African American and Latino students are likewise treated differently because they convey a different meaning and carry with them a different context. Of course, not every African-American, Latino or Native-American applicant attained grades or scores that were substantially affected by discrimination, just as not every Harvard graduate with a 3.4 GPA is better qualified than a 3.4 graduate from a lesser known school. But such is the nature of relying on averages – averages that are based not on stereotypes but on hard evidence and experience.

II. THE LAW SCHOOL'S POLICY SHOULD BE UPHELD UNDER THIS COURT'S STRICT SCRUTINY.

This Court has held that it is constitutionally permissible for governmental entities to take race into account in its decisionmaking process in order to satisfy a compelling governmental interest, as long as the process is narrowly tailored to satisfy that interest. See *Miller* v. *Johnson*, 515 U.S. 900, 920 (1995). It is well established that government has a compelling interest in remedying past and present discrimination (*id.* at 920) and in creating a diverse educational environment. See *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest . . . ."). In this case, both compelling interests are present. Either interest standing alone should satisfy this Court's strict scrutiny, and in combination, there should be no question that the Law School's policy is constitutionally permissible.

As this Court has recognized, very few jurisdictions are willing to assert past, or present, discrimination as a justification for affirmative action, which is precisely the reason the Intervenors were allowed to participate in these proceedings so as to assert interests that the Law School was likely unwilling to articulate. See *Wygant* v. *Jackson Bd. of Educ., supra*, 476 U.S. at 290 (O'Connor, J., concurring) (noting the importance of allowing public agencies "to meet voluntarily their civil rights obligations" without specific findings of illegal discrimination); *Grutter* v. *Bollinger*, 133 F.3d at 401 (finding Intervenors had adequately demonstrated that state was unlikely to present evidence of past discrimination or disparate impact). Thus, it should be of little constitutional concern that the law school failed to articulate a desire to remedy past and present discrimination

as a justification for its admission policy. Intervenors have presented a strong case that the policy can be supported on these grounds, a position the Court of Appeals elected not to consider when it upheld the policy based on the Law School's diversity rationale. See *Grutter* v. *Bollinger*, 288 F.3d 732, 739 n.4 (6th Cir. 2002). At a minimum, if this Court determines that the Law School's policy cannot be upheld under the diversity rationale, this case should be remanded for further consideration on whether remedial action was necessary as a remedy for discrimination perpetrated by the state and its subdivisions.[11]

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[11] The question of what constitutes a "strong basis in evidence" necessary to justify a remedial plan has been addressed on several occasions by this Court, but never in the context of higher education where the issues and context differ substantially from the other areas in which this Court has assessed the validity of affirmative action measures. Nevertheless, from this Court's doctrine, several analytical issues are clear. First, this Court has never held that a governmental entity is restricted to remedying its own discrimination. On the contrary, this Court has held that it is permissible for "a state or local subdivision . . .to eradicate the effects of private discrimination within its own legislative jurisdiction." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (footnotes omitted); see also *Adarand v. Pena*, 515 U.S. 200, 237 (1995) ("The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."); *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. at 287 (O'Connor, J., concurring) (noting that an affirmative action "plan need not be limited to the remedying of specific instances of identified discrimination" to be narrowly tailored."). Instead what this Court has cautioned against are governmental efforts designed to remedy societal discrimination. See *Wygant*, 476 U.S. 274 (plurality opinion). In contrast, the discrimination discussed herein is identified discrimination almost entirely attributable to the state and its subdivisions.

Indeed, it is the state's constitutional duty to ensure that its discrimination is fully remedied. As this Court has stated, the purpose of remedial relief is to "restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Milliken* v. *Bradley*, 418 U.S. at 746. The Law School's affirmative action program serves this purpose and is a critical means of ensuring adequate remediation.

The Law School's program has also been narrowly tailored to satisfy the state's remedial interests. In its *amicus curiae* brief filed on behalf of Petitioners, the United States suggested that the so-called percentage plans in place in several states could be a race neutral alternative. See Brief of the United States as *Amicus Curiae* at 14-17. These plans, in place in California, Florida and Texas, vary in their detail, and have been introduced with limited success. A comprehensive study of Texas found that most of the students admitted through the percentage plan would have been admitted under the prior admission process, and the authors concluded that the plan "could [only] achieve minimal campus diversity." M. Tienda et al., Closing the Gap? Admissions and Enrollments at the Texas Public Flagships Before and After Affirmative Action 41 (Jan. 2003). These plans also perniciously rely on segregation in housing to foster diversity in education. See M. Adams, Isn't It Ironic? The Central Paradox at the Heart of the "Percentage Plans," 62 Ohio St. L.J. 1729 (2001). Most important in the context of this case, none of the existing percentage plans apply to law school admissions and there is no indication that the plans either could or will be applied to graduate education in the future.

The Law School's treatment of Asian Pacific applicants also demonstrates the narrow tailoring of its policy. As explained in more detail in the brief *amicus curiae* of the National Asian Pacific American Legal Consortium, there is no ceiling on Asian-American applicants and they are not disadvantaged in relation to white applicants. Yet, unlike African Americans

and Latinos, there is not the same evidence that Asian Pacific Americans have suffered discrimination attributable to the state of Michigan resulting in suppression of their grades or test scores. Accordingly, they are not included in the affirmative action policy because on the facts Asian Pacific Americans "do not warrant affirmative action in this particular case." Chin, Cho, Kang & Wu, *supra*, at 159.

There remains the important question of when the Law School will be in a position to end its use of racial preferences. Over the last decade Michigan has experienced a substantial reduction in the test score gap for the SAT test typically used for undergraduate admission. See R.B. Slater, Ranking the States by the Black-White SAT Scoring Gap, 26 J. of Blacks in Higher Educ. 105, 108 (Winter 1999/2000) (between 1987 and 1999 there was a 59 point decrease in the gap, placing Michigan fifth among states). On a national level, there has also been a reduction in the LSAT score and undergraduate grade gap between African-American and white applicants to law school. See Law School Admission Council, Minority Databook, Table V-2, at 26 (2002).[12] Universities, test score administrators, and others are also working to reduce the excessive reliance on standardized tests that currently necessitate affirmative action measures. At the same time, there is no justification for ending the use of racial preferences simply because the battle for racial and ethnic justice has turned out to be a long and difficult one. This is particularly true when, as here, the reason the battle has been so long and difficult is because of the continuing impact of discrimination on the lives of minority students.

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[12] In 1991-92, African-American matriculated students had average LSAT scores of 149 and average UGPA of 2.92, while in 1998-99, their average scores were 148 and 3.0. For white matriculants, the average LSAT score in 1991-92 was 158 with an average UGPA of 3.24, and in 1998-99 the LSAT score had declined to 155 with an average UGPA of 3.26. See Law School Admission Council, *supra*, at Table V-2, at 26.

III. PRUDENTIAL CONSIDERATIONS COUNSEL IN FAVOR OF UPHOLDING THE LAW SCHOOL'S PLAN.

In addition to the compelling justification for the law school's admission plan, a number of prudential considerations weigh heavily in favor of upholding the plan. Justice Powell's opinion in *Bakke* has guided affirmative action in higher education for the last twenty-five years.[13] This is perhaps nowhere more evident than in the *amici* briefs that are being filed with the Court in these cases. By the time the briefs are filed, virtually every institution of higher education will be represented in the briefs filed in support of the University of Michigan and its Law School. Equally telling, not a single accredited institution of higher education has filed a brief in support of the Petitioners.

Understandably, the Court has, on several recent occasions, declined to overturn past precedents, when the

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[13] There is also a substantial scholarly consensus that Justice Powell's opinion in *Bakke* represents controlling precedent on educational affirmative action. See, e.g., A.R. Amar & N.K. Kaytal, *Bakke's* Fate, 43 UCLA L. Rev. 1745, 1768 (1996) (concluding that Justice Powell's opinion in *Bakke* "remains binding precedent"); R. Fallon, Foreword: Implementing the Constitution, 111 Harv. L. Rev. 54, 85 (1997) (referring to "Justice Powell's still controlling opinion in . . . *Bakke*); D. Malamud, Affirmative Action, Diversity, and the Black Middle Class, 68 U. Colo. L. Rev. 939, 945 (1997) ("Under . . . *Bakke*, colleges and universities may use affirmative action to achieve diversity in admissions"); P. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw, 149 U. Pa. L. Rev. 1, 34 (2000) (defining Justice Powell's *Bakke* opinion as "the controlling opinion in what . . . remains the Supreme Court's leading affirmative action case."); R.Post, Introduction: After *Bakke*, in Race and Representation: Affirmative Action 13-14 (R. Post & M. Rogin eds. 1998) ("Although Powell wrote for himself alone, his view . . . has remained the governing law to this day); M. Selmi, The Life of Bakke: An Affirmative Action Retrospective, 87 Geo. L.J. 981, 983 (1999) (same).

precedent has found "wide acceptance in the legal culture." *Dickerson v. United States*, 530 U.S. 428, 443 (2000) (quoting *Mitchell v. United States*, 526 U.S. 314, 331-32 (1999) (Scalia, J., dissenting)). At this juncture, there can be little question that our nation's higher education system has adapted to Justice Powell's *Bakke* opinion and that many institutions have incorporated race and ethnicity into the admission process as a means of remedying past and present discrimination, as well as to ensure diversity within their student bodies.

The general public, as well, does not seem inclined to eliminate affirmative action in higher education admissions. Although the issue has been debated repeatedly by the people's elected representatives in Congress over the last two decades, no legislation has been enacted to disturb the existing race conscious practices, either in education or in contract set-asides where the federal government continues to support affirmative action measures as a way to overcome a well-documented history of discrimination. See *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000), *cert. dismissed*, 534 U.S. 103 (2001) (upholding federal set-aside program). Obviously, states and localities remain free to prohibit the use of race in the admission process through legislation. Although two states – California and Washington – have done so,[14] there does not appear to be any movement towards greater legislative repeal of affirmative action measures.

This Court's legitimacy is most at risk when the Court reverses well-established precedent - precedent that has been incorporated into the fabric of the law - without any clear justification from this Court's doctrine or the history

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[14] The state of Florida has also eliminated the use of race conscious measures in higher education admissions, but it did so through an Executive Order rather than legislative action. See Executive Order 99-281 (1999).

surrounding the passage of the Fourteenth Amendment. No such justification exists in this case. On the contrary, there remains a strong need for the continued use of affirmative action to fulfill the promise of the Fourteenth Amendment, a promise of equal opportunity that the realities of past and present discrimination continue to frustrate for all too many students of color.

CONCLUSION

For the reasons discussed above, the decision of the Court of Appeals should be affirmed.

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